



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

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| Agency Name: | 9 VAC 25 |
| VAC Chapter Number: | 640 |
| Regulation Title: | Regulation For Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements |
| Action Title: | Regulation for Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements |
| Date: | February 1, 2000 |

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The proposed regulation provides the criteria by which operators of aboveground storage tank and pipeline facilities can demonstrate that they have adequate financial resources to perform their responsibility to contain and cleanup any oil discharges which may occur at their facilities. The regulation provides six methods of financial responsibility demonstration: (1) financial test of self-insurance; (2) guarantee; (3) insurance; (4) surety bond; (5) letter of credit; and (6) trust fund. Forms for each method are included as appendices to the regulation. The proposed regulation sets the amount of financial responsibility required at (i) five cents per gallon multiplied by the operator's statewide aboveground storage tank facility capacity as the amount of the annual demonstration requirement for aboveground storage tank facility

operators and (ii) five million dollars as the amount of the annual demonstration requirement for pipeline facility operators.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The legal basis for the proposed regulation is the State Water Control Law (Title 62.1, Chapter 10 of the Code of Virginia). Specifically, Section 62.1-44.34:16 D requires operators to demonstrate financial responsibility as a condition of operation and authorizes the Board to promulgate regulations requiring operators of facilities to demonstrate financial responsibility sufficient to comply with the requirements of Article 11 of the State Water Control Law.

Section 62.1-44.34:16 D states that the financial responsibility for facilities shall not exceed five cents per gallon of aboveground storage capacity or five million dollars for a pipeline. Additionally, that section states that the financial test of self-insurance shall not require the operator to demonstrate more than one dollar of net worth for each dollar of required financial responsibility. Finally, the section states that no governmental agency shall be required to comply with the facility financial assurance regulations. Accordingly, the proposed regulation limits the demonstration amount to five cents per gallon of aboveground storage capacity and five million dollars for pipelines and does not require operators to demonstrate more than one dollar of net worth for each dollar of required financial responsibility. Additionally, the regulation does not apply to government agencies.

Section 62.1-44.34:16 D also requires that regulations governing the amount of financial responsibility take into consideration (1) the type, oil storage or handling capacity and location of a facility, (2) the risk of discharge of oil at that type of facility, (3) the potential damage or injury to state waters or the impairment of their beneficial use that may result from a discharge at this type of facility, (4) the potential cost of containment and cleanup at that type of facility, and (5) the nature and degree of injury or interference with general health, welfare and property that may result from a discharge at that type of facility.

The demonstration amount is set at five cents per gallon of aboveground storage capacity for aboveground storage tanks and five million dollars for pipelines, but caps the aboveground storage tank demonstration at one million dollars (the level which would correspond to 20 million gallons of storage capacity). Several AST operators have more than 20 million gallons of storage capacity, but DEQ's fifteen years of experience in managing petroleum cleanups indicates that the \$1 million cap is reasonable. There has never been an AST discharge approaching 20 million gallons. The \$1 million cap is also consistent with the financial responsibility demonstration requirement imposed by state and federal law on underground storage tank owners and operators.

Through management of facility cleanups, DEQ has experience with (1) facilities throughout the state, (2) the risk of discharge at facilities throughout the state, (3) actual damage/injury incurred to state waters and their beneficial uses from discharges, (4) actual containment/cleanup costs for more than 250 facility discharges, and (5) the nature and degree of injury or interference with health and welfare caused by these discharges. Based on the Department's experience, consideration of the factors included in Virginia Code Section 62.1-44.34:16 D supports the demonstration requirement recommended in the regulation. For all facilities, regardless of location, some risk of discharge exists. Moreover, because state waters include ground water, and because the threat of ground water impact exists for discharges from facilities regardless of location, any facility release presents the potential to damage state waters. Besides the obvious threat to drinking water supplies posed by contamination from facility discharges, other health and welfare damages have included vapor and fire hazards. Most importantly, the costs to contact and cleanup facility discharges virtually always exceed the financial responsibility requirement of five cents per gallon of storage capacity. Thus, setting the requirement at that level will help to ensure adequate funding for containment and cleanup is available.

There is no federal requirement to promulgate regulations regarding financial assurance for aboveground storage tank or pipeline facilities.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the regulation is to protect the health, safety and welfare of the citizens of the Commonwealth by ensuring aboveground storage tank and pipeline facility operators maintain adequate financial resources to contain and cleanup discharges of oil which may occur at their facilities.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The proposed regulation requires aboveground storage tank and pipeline facility operators to demonstrate that they have the financial ability to pay for containment and cleanup of oil discharges that may occur at their facilities. Six methods of financial assurance are provided: (1) financial test of self-insurance; (2) guarantee; (3) insurance; (4) surety bond; (5) letter of credit; and (6) trust fund. The forms for each method are included as appendices to the regulation.

The amount of demonstration required for aboveground storage tank facility operators is five cents per gallon multiplied by the total aboveground storage tank capacity at the operator's Virginia facilities, up to \$1 million. The amount of demonstration required for pipeline facility operators is \$5 million.

The proposed regulation requires financial assurance mechanisms to be updated annually.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantages and disadvantages of implementation and compliance with this regulation by the public and the Department are discussed below.

For the public, the primary advantage of implementation of this regulation is that it helps to ensure that operators will have adequate financial resources to perform containment and cleanup of oil discharges that occur at their facilities. Prompt containment and cleanup should help reduce or prevent impacts to humans and the environment.

The requirement for operators to demonstrate financial responsibility as a condition of operating a facility already exists pursuant to Virginia Code Section 62.1-44.34:16 D. Therefore, the proposed regulation does not add any additional disadvantage. Rather, the proposed regulation provides the regulatory basis for implementing the statutory requirement. Operators will incur some cost to comply with the financial responsibility requirements; however, for most operators, the cost should be negligible.

For the Department the regulation will increase the Department's workload in that it will result in the need to perform compliance reviews; however, the advantages of the regulation should outweigh the additional burden. The regulation will assist the Department by helping to ensure that operators have funds available to perform containment and cleanup. This should help to reduce the need for state lead cleanups (those conducted by the state) and associated cost recovery efforts.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's

best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

Because the statute requires financial responsibility demonstration as a condition of operation, facilities not able to demonstrate the required financial responsibility would not be able to operate. The regulation will apply to approximately 400 regulated aboveground storage tank facility operators and to 3 pipeline facility operators. Depending on the financial responsibility method elected, the costs to comply with this regulation could range from a negligible expense to approximately \$200,000 per year.

Operators whose financial statements are audited by an independent auditor or whose financial information is reported to the Securities Exchange Commission, Energy Information Administration, Rural Electrification Administration or Dun and Bradstreet may use the financial test of self-insurance to meet their financial responsibility demonstration requirements. This method entails negligible expense, requiring only a small amount of the operator's staff time to prepare a letter from the operator's financial officer.

Like the financial test of self-insurance, the guarantee also only requires staff time to prepare the guarantee and also results in negligible expense. Operators who have a substantial business relationship with an entity that meets the financial test requirements may use a guarantee from that entity to demonstrate financial responsibility. The guarantee method requires that the entity (guarantor) provide a letter from its financial officer demonstrating that it has adequate funding to support the guarantee and that the guarantor establish an unfunded standby trust in the event the guarantor must pay on the guarantee. Because the Department provides all forms, it should not be necessary to incur legal fees for document preparation. Additionally, because the standby trust is unfunded, no trust management fees would be incurred.

The Department anticipates the majority of operators will use the financial test of self-insurance or a guarantee to meet the financial responsibility requirements.

The costs of the other methods vary. Insurance estimates the Department has obtained indicate that the cost to purchase insurance for Virginia's largest aboveground storage tank facility would be approximately \$207,000. For the average facility, the cost to obtain insurance would be approximately \$7,500 annually.

The usual cost of letters of credit was reported to the Department to be two percent of the amount of the letter of credit. Thus, for a pipeline, it could cost \$100,000 per year to meet its demonstration requirement using a letter of credit. For an operator with 20,000,000 gallons of statewide aboveground storage capacity, it could cost \$20,000 per year to meet its demonstration requirement with a letter of credit. Notably, major customers of banks are often able to obtain a reduced rate on letters of credit. Thus, the estimate provided here is likely to be significantly higher than the actual cost an operator would have to pay for a letter of credit.

For surety bonds, it is estimated that the cost for an operator with 20,000,000 gallons of statewide aboveground storage capacity would be approximately \$9,000. For a pipeline, the cost should not exceed \$37,000 annually.

Based on experience with the underground storage tank financial assurance requirements and with solid and hazardous waste facility financial assurance requirements, the Department believes that most operators incur only a negligible annual expense to comply with this regulation, because most operators are likely to self-insure or obtain a guarantee.

There are no localities that will bear any identified disproportionate material impact due to the proposed regulation.

It is not expected that the regulation will result in any cost to the Department beyond that currently in the budget. Because the Department is responsible for administering several financial assurance programs, including programs for underground storage tanks, solid waste facilities and hazardous waste facilities, staff with the ability to administer the proposed regulation are already in place. Because the financial assurance forms to be used are substantially the same as those used in the existing underground storage tank financial assurance program, no additional training will be required to implement the regulation. Finally, existing databases are adequate to provide tracking for the financial assurance program contemplated by this regulation.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulation will not strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; encourage or discourage economic self-sufficiency, self-pride and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; strengthen or erode the marital commitment; nor increase or decrease disposable family income. However, the proposed regulation will ensure that any environmental impacts on the family resulting from an oil discharge will be negligible because facility and pipeline operators will have the financial capability to contain and clean up any oil discharge.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

The proposed regulation requires aboveground storage tank and pipeline facility operators to demonstrate that they have the financial ability to pay for containment and cleanup of oil discharges that may occur at their facilities. Six methods of financial assurance are provided: (1)

financial test of self-insurance; (2) guarantee; (3) insurance; (4) surety bond; (5) letter of credit; and (6) trust fund. The forms for each method are included as appendices to the regulation.

The amount of demonstration required for aboveground storage tank facility operators is five cents per gallon multiplied by the total aboveground storage tank capacity at the operator's Virginia facilities, up to \$1 million. The amount of demonstration required for pipeline facility operators is \$5 million.

The proposed regulation requires financial assurance mechanisms to be updated annually, establishes compliance dates and record keeping and reporting requirements.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

In conjunction with the publication of the Notice of Intended Regulatory Action, the Department requested comments from the public. These comments were incorporated into the draft regulation that was used to conduct an ad hoc work group meeting at which the Department sought comments from trade associations, environmental groups, members of the proposed regulated community and any other interested persons. Participants in the meeting included trade associations and members of the regulated community. Additionally, the draft regulation was sent to environmental groups, none of which offered comments for alternatives.

The alternatives for achieving the essential purpose of the regulation focused on three areas: (1) how much financial assurance should be required; (2) by what method financial assurance is demonstrated; and (3) how reporting and record keeping should proceed. With respect to the amount of demonstration, no comments suggested alternatives; however, the Department considered applying a limit on the maximum amount of aboveground storage tank facility demonstration based on actual knowledge of the history of discharges in the Commonwealth. This alternative, which is less burdensome to the regulated community than the prior version, was accepted.

As to methods for demonstrating financial assurance, the Department anticipated comments requesting that certain portions of the self-insurance method be eliminated because of comments it received in 1998 in conjunction with amendments to a similar financial assurance regulation for petroleum underground storage tanks (USTs). Again, based on public comments to the petroleum UST financial assurance regulation, the Department revised the self-insurance form. Notably, the alternatives available for financial assurance demonstration include a variety of mechanisms that meet operators' needs for economy and privacy of financial information. Additionally, the alternatives are similar to those available in the petroleum UST financial assurance regulation. Because those alternatives have been in place for approximately a decade, the regulated community is already familiar with the forms.

The only alternative suggested which was rejected was a request to allow use of the guarantee mechanism where the guarantor and operator have consolidated financial statements. This

alternative was rejected because it would result in overstatement of assets available to cover the guarantee. Overstatement of assets could result in situations in which neither the guarantor nor the operator maintain adequate assets to pay for containment and cleanup. In such a situation, the taxpayers of the Commonwealth could be burdened with the operator's share of containment and cleanup costs.

With respect to record keeping and reporting requirements, the Department had proposed requiring submission of the original mechanisms and maintenance of copies at the operator's place of work in the Commonwealth. A comment made by an ad hoc work group participant put forth the alternative of not requiring the copies at the place of work because the originals would be on file with the Department. This alternative was accepted. No other alternatives were proposed.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

There were no public comments received after publication of the second Notice of Intended Regulatory Action. The comments received after publication of the initial Notice were incorporated into the draft regulation which was used to finalize the proposal with assistance from an ad hoc work group. See alternatives discussion.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Department received comments from ad hoc work group participants with respect to provisions in the regulation which were unclear. The Department worked with the ad hoc work group participants to revise the language as requested. With these revisions, the regulation is now clearly written and easily understandable by the regulated community.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The Department will evaluate the regulation for effectiveness and continued need within three years after its effective date.

The specific and measurable goals the proposed regulation is intended to achieve are: (1) to protect public health and/or welfare with the least possible costs and intrusiveness to the citizens and businesses of the Commonwealth and (2) to ensure that aboveground storage tank and pipeline facility operators maintain adequate financial resources to contain and cleanup oil discharges which may occur at their facilities.